

No. 42423-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Brian Tauscher,**

Appellant.

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Lewis County Superior Court Cause No. 10-1-00314-7

The Honorable Judge Nelson Hunt

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial judge infringed Mr. Tauscher's Sixth and Fourteenth Amendment right to conflict-free counsel.
2. The trial judge erred by refusing to appoint new counsel at a critical stage of the proceeding.
3. The trial judge applied the wrong legal standard when refusing to appoint new counsel.
4. The trial judge erred by failing to recognize the extent of the conflict of interest created by Mr. Tauscher's motion to withdraw his guilty plea.
5. The trial judge erred by summarily denying Mr. Tauscher's request to withdraw his guilty plea.
6. Mr. Tauscher's guilty plea was entered in violation of his Fourteenth Amendment right to due process.
7. Mr. Tauscher's guilty plea violated his Fourteenth Amendment right to due process because it was entered without an accurate understanding of the consequences.
8. Mr. Tauscher's guilty plea violated his Fourteenth Amendment right to due process because it was entered based on misinformation regarding the consequences of conviction of the original charges.
9. The sentencing judge erred by sentencing Mr. Tauscher with an offender score of six.
10. The prosecution failed to prove the comparability of Mr. Tauscher's out-of-state conviction.
11. The sentencing judge erred by including Mr. Tauscher's California conviction for "Grand Theft" in the offender score.
12. The sentencing judge erred by concluding that Mr. Tauscher's California conviction for "Grand Theft" was comparable to a Washington felony.

13. The sentencing court erred by adopting Finding No. 2.2 of the Judgment and Sentence.
14. The sentencing court erred by adopting Finding No. 2.3 of the Judgment and Sentence.
15. The sentencing court erred by finding that Mr. Tauscher has the ability or likely future ability to pay his legal financial obligations.
16. The sentencing court erred by adopting Finding No. 2.5.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An accused person has a constitutional right to be represented by conflict-free counsel at all critical stages of a criminal proceeding, including a presentence motion to withdraw a guilty plea. Here, Mr. Tauscher asked the court to appoint new counsel to pursue a motion to withdraw the guilty plea, based on ineffective assistance of counsel. Did the trial court violate Mr. Tauscher's Sixth and Fourteenth Amendment right to conflict-free counsel at all critical stages of a criminal case by refusing to appoint new counsel?
2. A guilty plea violates due process if it is entered without knowledge of the consequences. In this case, Mr. Tauscher was misinformed as to the standard range; he was also misadvised of the consequences of conviction following trial on the original Information. Did entry of the guilty plea violate Mr. Tauscher's Fourteenth Amendment right to due process?
3. An out-of-state conviction may not be included in the offender score unless the prosecution proves comparability to a Washington felony. Here, Mr. Tauscher objected to inclusion of his California conviction for "Grand Theft," and the state failed to prove its comparability. Did the trial court err by including Mr. Tauscher's California conviction in his offender score without proof that it was comparable to a Washington felony?

4. A sentencing court may not find that an offender has the ability or likely future ability to pay legal financial obligations absent some support in the record for the finding. Here, sentencing court made such a finding in the absence of any evidence in the record. Was the sentencing court's finding clearly erroneous?

### **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Brian Tauscher was charged with Rape of a Child in the First Degree, Incest in the First Degree, and Child Molestation in the First Degree. Information, Supp. CP. He reached an agreement with the prosecution, and pled guilty to Attempted Child Molestation in the First Degree. Statement of Defendant on Plea of Guilty, Supp. CP. His plea form recited his standard sentencing range as 111.75-148.5 months (minimum) and life (maximum). Statement, p. 2, Supp CP.

Prior to sentencing, Mr. Tauscher asked the court to appoint a new attorney, and moved to withdraw his guilty plea. Letter from Defendant, Motion for Appt. of Counsel, Motion for Appt. of New Counsel, Motion to Withdraw Guilty Plea, Supp. CP. He alleged that his attorney, David Brown, had coerced him into pleading guilty. Letter, Supp. CP. He also said that Mr. Brown had failed to investigate information relevant to the defense, had failed to talk with certain witnesses, and had stopped working on Mr. Tauscher's behalf after receiving a plea offer. Motion for Appointment of Counsel, Motion for Appointment of New Counsel, Supp. CP. Mr. Tauscher told the court that newly discovered evidence established his innocence. Specifically, he wrote that two of his sons had said that the alleged victim "was taught how to act and what to say" in

order to make her accusations credible. Motion for Appointment of New Counsel, Supp. CP.

The court addressed these motions at the sentencing hearing. RP (8/25/10). When the judge invited defense counsel to speak, Mr. Brown said:

I don't think there is anything in the motion to respond to. As far as our relationship, I continue to work with Mr. Tauscher since he filed these motions.

RP (8/25/10) 11-12.

The court then questioned Mr. Tauscher, briefly, as follows:

THE COURT: Mr. Tauscher, do you want to be heard on it?

Anything in addition to what you've already written in?

THE DEFENDANT: I feel with proper representation I have a good chance of going to trial and beating this.

THE COURT: So why did you plead guilty then?

THE DEFENDANT: I felt I was pushed into it.

THE COURT: By whom and how?

THE DEFENDANT: By Mr. Brown.

THE COURT: What he [sic] do to push you into it?

THE DEFENDANT: He told me if I didn't do the deal I would be doing life without parole.

THE COURT: Which is entirely possible. You told the judge, me, all of us, that you were pushed into it, you didn't want to plead?

This was totally involuntary when we went through the plea.

THE DEFENDANT: Yes, sir.

THE COURT: You told me that? No, of course you didn't tell me that. I'm talking about when you did your plea.

THE DEFENDANT: Sorry, sir.

THE COURT: You didn't, did you?

THE DEFENDANT: No.

THE COURT: There is no basis here to withdraw the plea as far as I can see so I'll deny both motions.

RP (8/25/10) 12-13.

Mr. Brown did not dispute any of these allegations. RP (8/25/10).

The court then sentenced Mr. Tauscher to 114 months to life in prison. CP 4-18.

Some months later, Mr. Tauscher made a motion to modify or correct his sentence, alleging that the court had improperly calculated his offender score. Motion to Modify or Correct (11/5/10), Supp CP. A new attorney was appointed; this new attorney filed an Amended Motion to Modify or Correct, along with a Memorandum of Authorities. Amended Motion, Supp. CP; Memorandum, Supp. CP.

Mr. Tauscher argued that his two prior California convictions should not have been included in his offender score. Amended Motion, pp. 1-3 Supp. CP. The prosecutor conceded that Mr. Tauscher's juvenile conviction for "Lewd and Lascivious Acts" was not comparable to its Washington counterpart, but argued that his "Grand Theft" conviction under California Penal Code Section 487a was comparable to the Washington offense of Theft of Livestock in the Second Degree under former RCW 9A.56.080 (1995). State's Response to Defense Motion, Supp. CP.

The court held a hearing, and concluded that the "Grand Theft" conviction was equivalent to second-degree livestock theft. The judge sentenced Mr. Tauscher to 97.5 months to life in prison. CP 23. The

court also imposed legal financial obligations, and entered a finding that Mr. Tauscher “has the ability or likely future ability to pay the legal financial obligations imposed herein.” CP 22.

Mr. Tauscher timely appealed. CP 34.

## **ARGUMENT**

**I. THE TRIAL JUDGE APPLIED THE WRONG LEGAL STANDARD AND VIOLATED MR. TAUSCHER’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO APPOINT A NEW ATTORNEY.**

**A. Standard of Review**

Constitutional errors are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A trial court’s refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wash.2d 580, 607, 132 P.3d 80 (2006).

**B. Because it was based on a claim of ineffective assistance, Mr. Tauscher’s presentence request to withdraw his guilty plea created a conflict of interest requiring the appointment of new counsel.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9

L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wash.2d 798, 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)).

Denial of counsel at a critical stage of proceedings is presumptively prejudicial. *State v. Chavez*, 162 Wash.App. 431, 439, 257 P.3d 1114 (2011) (citing *United States v. Cronin*, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Prior to sentencing, a defendant’s motion to withdraw her or his guilty plea is a critical stage.<sup>1</sup> *Id*; see also *State v. Pugh*, 153 Wash.App. 569, 579, 222 P.3d 821 (2009) (“A CrR 4.2(f) presentence motion to withdraw a guilty plea is a critical stage of a criminal proceeding for which a defendant has a constitutional right to be assisted by counsel”); *State v. Davis*, 125 Wash.App. 59, 64, 104 P.3d 11 (2004). This is so whether or not the motion has merit. *Chavez*, at 439-440. Denial of counsel at a hearing on a presentence motion to withdraw a

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<sup>1</sup> By contrast, a defendant is not automatically entitled to counsel to pursue a post-judgment motion to withdraw a guilty plea. *State v. Forest*, 125 Wash.App. 702, 707, 105 P.3d 1045 (2005).

guilty plea requires automatic reversal, without the need for a showing of prejudice. *State v. Harell*, 80 Wash.App. 802, 805, 911 P.2d 1034 (1996).

In this case, Mr. Tauscher sought to withdraw his plea and moved for the appointment of new counsel prior to entry of the judgment and sentence. Letter from Defendant, Motion for Appt. of Counsel, Motion for Appt. of New Counsel, Motion to Withdraw Guilty Plea, Supp. CP. Because he brought his motion prior to sentencing, he was constitutionally entitled to the assistance of counsel. *Chavez*, at 439-440. In light of the ineffective assistance allegations, appointed counsel could not ethically represent Mr. Tauscher on the motion. See RPC 1.7. Despite the obvious conflict, the trial judge summarily denied Mr. Tauscher's motion for the appointment of new counsel. RP (8/25/10) 12-13. This was error. *Chavez*, *supra*. Accordingly, the Judgment and Sentence must be vacated and the case remanded for appointment of new counsel. *Id.*

C. The trial court erroneously relied on the post-judgment standard for appointment of new counsel in denying Mr. Tauscher's request.

Instead of appointing new counsel, the court apparently applied the test required under CrR 3.1 for post-judgment motions brought pursuant to CrR 7.8. To qualify for appointed counsel, an offender seeking to withdraw his plea *after* entry of the judgment and sentence must make an initial showing that the motion is not frivolous. *State v. Robinson*, 153

Wash.2d 689, 696, 107 P.3d 90 (2005). If the motion establishes “grounds for relief,” new counsel must be appointed. *Id.*

Even under this test, the trial judge erred in refusing to appoint counsel. Mr. Tauscher alleged that his attorney had failed to investigate his case and had (erroneously) informed him that he’d face a sentence of life without parole if convicted following trial.<sup>2</sup> RP (8/25/10) 12-13. This allegation establishes the “grounds for relief” required under *Robinson*. See, e.g., *In re Isadore*, 151 Wash.2d 294, 88 P.3d 390 (2004); *State v. A.N.J.*, 168 Wash.2d 91, 225 P.3d 956 (2010).

The trial court’s refusal to appoint conflict-free counsel violated Mr. Tauscher’s Sixth and Fourteenth Amendment right to counsel. *Chavez*, at 439-440. Accordingly, the judgment and sentence must be vacated and the case remanded to the superior court for appointment of counsel to pursue Mr. Tauscher’s motion to withdraw his guilty plea. *Id.*

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<sup>2</sup> Mr. Tauscher did not have the requisite predicate offenses for a persistent offender sentence of life without possibility of parole. See RCW 9.94A.030. Even defense counsel’s misunderstanding of the California conviction did not bring Mr. Tauscher within the three-strikes law. The prosecutor’s calculation of the standard range under the original information was 240-318 months to life. State’s Proposal on Plea of Guilty (attachment to Statement of Defendant on Plea of Guilty, Supp. CP).

**II. MR. TAUSCHER’S CONVICTION WAS ENTERED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

**A. Standard of Review**

The voluntariness of a plea may be raised for the first time on appeal. *State v. Mendoza*, 157 Wash.2d 582, 589, 141 P.3d 49 (2006).

The state bears the burden of proving the validity of a guilty plea. *State v. Ross*, 129 Wash.2d 279, 287, 916 P.2d 405 (1996).

**B. A guilty plea is involuntary if entered without an understanding of the consequences of the plea.**

Due process requires an affirmative showing that a guilty plea is knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Isadore*, *supra*; , *supra*. This includes knowledge of the consequences of the plea. *State v. A.N.J.*, at 113; *see also Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) (defense counsel ineffective for giving inaccurate information regarding immigration consequences of guilty plea.)

The consequences of a plea include the length of any potential sentence that might be imposed. *See, e.g., In re Bradley*, 165 Wash.2d 934, 939, 205 P.3d 123 (2009). A guilty plea based on incorrect information may be withdrawn whether or not a particular direct consequence was material to the decision to plead guilty. *Isadore*, at 302.

In this case, Mr. Tauscher was misinformed as to the standard range for the offense of conviction.<sup>3</sup> At the time he pled guilty (and at sentencing), the parties and the court erroneously believed his minimum standard range sentence was 111.75-148.5 (with a maximum of life in prison). Stipulation on Prior Criminal Record, Judgment and Sentence (8/25/10), Supp. CP. This was based on defense counsel's failure to understand that the California juvenile conviction for "Lewd or Lascivious Acts" was not comparable to a Washington felony. Stipulation, Supp. CP. The error was corrected only after new counsel was appointed. Order Vacating Judgment and Sentence, Supp. CP.

Because Mr. Tauscher was misinformed about his standard range, his guilty plea was involuntary. *Isadore*, at 302. Accordingly, his conviction must be reversed and the case remanded to the trial court for a new trial. *Id.*

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<sup>3</sup> In addition, Mr. Tauscher was misinformed as to the consequences of conviction at trial. As he told the trial judge, his attorney erroneously told him he'd be sentenced to life without possibility of parole if convicted as charged. Defense counsel did not dispute this allegation. RP (8/25/10) 12-13.

**III. MR. TAUSCHER’S SENTENCE MUST BE VACATED BECAUSE HIS CALIFORNIA “GRAND THEFT” CONVICTION IS NOT COMPARABLE TO A WASHINGTON FELONY.**

- A. The prosecution is required to prove the existence and comparability of any out-of-state conviction.

At sentencing, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.” RCW 9.94A.500(1). Under RCW 9.94A.525, the sentencing court is required to determine an offender score. The offender score is calculated based on the number of adult and juvenile felony convictions existing before the date of sentencing. RCW 9.94A.525(1).

Out-of-state convictions are provided for in RCW 9.94A.525(3), which reads (in relevant part) as follows:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law... If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). Where the state alleges a defendant’s criminal history contains out-of-state convictions, the prosecution bears the burden of proving the existence and comparability of those convictions. *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999). An out-of-state

conviction may not be used to increase an offender score unless the state proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wash. App. 165, 168, 868 P.2d 179 (1994).

To determine whether an out-of-state conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state conviction to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wash.2d 588, 606, 952 P.2d 167 (1998). “If the elements are not identical, or if the Washington statute defines the offense more narrowly than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.” *Ford*, at 479 (citing *Morley*, at 606). The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington.” *State v. Berry*, 141 Wash.2d 121, 130-31, 5 P.3d 658 (2000) (citing *State v. Cameron*, 80 Wash.App. 374, 378, 909 P.2d 309 (1996)).

In this case, the state failed to prove that Mr. Tauscher’s out-of-state conviction for “Grand Theft” was equivalent to a Washington felony offense.

- B. Mr. Tauscher's out-of-state conviction for "Grand Theft" should not have been included in his offender score.

In interpreting a statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wash.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wash.2d 186, 194-195, 102 P.3d 789 (2004). Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009).<sup>4</sup> A court "will not engage in judicial interpretation of an unambiguous statute." *State v. Davis*, 160 Wash.App. 471, 477, 248 P.3d 121 (2011).<sup>5</sup> Where a statute fails to define a term, rules of statutory construction require that the term be given its plain and ordinary meaning, derived from a standard dictionary if possible. *McClarty v. Totem Elec.*, 157 Wash.2d 214, 225, 137 P.3d 844 (2006).

The documents before the court on the issue of Mr. Tauscher's "Grand Theft" conviction consisted of a copy of California Penal Code Section 487a, and a "Minute Order & Order of Probation," which

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<sup>4</sup>See also *State v. Punsalan*, 156 Wash.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction.")

<sup>5</sup> A statute is ambiguous when the language is susceptible to multiple interpretations. *Id.*

indicates that Mr. Tauscher entered a *nolo contendere* plea to section 487a.

See attachments to Amended Motion to Modify, Supp. CP. The California code section is captioned “487a. Grand theft: stealing, transporting, appropriating, etc., carcass of animal,” and reads as follows:

(a) Every person who shall feloniously steal, take, transport or carry the carcass of any bovine, caprine, equine, ovine, or suine animal or of any mule, jack or jenny, which is the personal property of another, or who shall fraudulently appropriate such property which has been entrusted to him, is guilty of grand theft.

(b) Every person who shall feloniously steal, take, transport, or carry any portion of the carcass of any bovine, caprine, equine, ovine, or suine animal or of any mule, jack, or jenny, which has been killed without the consent of the owner thereof, is guilty of grand theft.

California Penal Code Section 487a. The parties and the court believed that the potentially comparable state offense was Theft of Livestock, which, at the time of the California offense, was criminalized by former RCW 9A.56.080 (1995).

“Grand Theft” under this section of the California Penal Code is not comparable to Washington’s “Theft of Livestock” statutes. The California statute explicitly covers only the theft of a carcass—the body of a dead animal.<sup>6</sup> See, e.g., *People v. Gardner*, 90 Cal.App.3d 42, 47, 153

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<sup>6</sup> In addition, section 487a covers theft of “caprine” (goat) carcasses, while former RCW 9A.56.080 (1995) did not include stealing goats within the definition of Theft of Livestock.

Cal.Rptr. 160 (1979) (the word “carcass” is “generally defined as ‘a dead body of ... an animal.’”) Washington’s Theft of Livestock is more akin to California Penal Code Section 487g, which relates to the theft of live animals.<sup>7</sup>

The sentencing judge circumvented this difficulty by holding that Theft of Livestock (under RCW 9A.56.080 and RCW 9A.56.083) applies to the theft of an animal carcass. RP (7/26/11) 7-8. This was incorrect. First, no published court opinion has ever approved this unduly broad definition. Second, to give effect to the legislature’s intent, the statute must be interpreted using the ordinary meaning of “livestock.” *McClarty*, at 225. The word “livestock” means “the horses, cattle, sheep, and other useful animals kept or raised on a farm or ranch.” *Dictionary.Com*, based on *The Random House Unabridged Dictionary* (Random House, 2011). It does not encompass animal carcasses.

Accordingly, section 487a is not comparable to Theft of Livestock under former RCW 9A.56.080 (1995). Instead, the theft of an animal

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<sup>7</sup> That section is captioned “Animals; stealing, taking or defrauding another; commercial use; offense; punishment,” and reads as follows “Every person who steals or maliciously takes or carries away any animal of another for purposes of sale, medical research, slaughter, or other commercial use, or who knowingly, by any false representation or pretense, defrauds another person of any animal for purposes of sale, medical research, slaughter, or other commercial use is guilty of a public offense punishable by imprisonment in a county jail not exceeding one year or in the state prison.” California Penal Code section 487g.

carcass would fall under Washington's general theft statutes. *See* RCW 9A.56.030; RCW 9A.56.040; RCW 9A.56.050. Although first- and second-degree thefts are felonies, third-degree theft is not. The prosecution failed to produce any evidence proving that Mr. Tauscher would have been guilty of first or second-degree theft rather than third-degree theft.

Accordingly, the sentence must be vacated. Because the state failed to sustain its burden even in the face of Mr. Tauscher's comparability objection, the prosecution is held to the existing record on remand. *In re Cadwallader*, 155 Wash.2d 867, 878, 123 P.3d 456 (2005). The case must be remanded to the trial court for resentencing with an offender score of five. *Id.*

**IV. THE SENTENCING COURT'S FINDING REGARDING MR. TAUSCHER'S PRESENT OR FUTURE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS IS NOT SUPPORTED BY THE RECORD.**

Absent adequate support in the record, a sentencing court may not enter a finding that an offender has the ability or likely future ability to pay legal financial obligations. *State v. Bertrand*, \_\_\_ Wash.App. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_ (2011). In this case, the sentencing court entered such a finding without any support in the record. CP 22. Accordingly, the finding must be vacated. *Id.*

## **CONCLUSION**

For the foregoing reasons, Mr. Tauscher's conviction must be vacated and the case remanded to the trial court.

Even if the conviction is not vacated, the sentence must be vacated. The case must either be remanded for appointment of counsel to pursue Mr. Tauscher's motion to withdraw his guilty plea, or remanded for resentencing with an offender score of five.

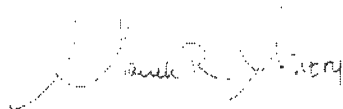
In the alternative, the sentencing court's finding that Mr. Tauscher has the ability or likely future ability to pay his legal financial obligations must be vacated.

Respectfully submitted,

**BACKLUND AND MISTRY**



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## CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Brian Tauscher, DOC #755508  
Coyote Ridge Corrections Center  
P.O. Box 769  
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Sara Beigh  
Lewis County Prosecuting Attorney  
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 16, 2011.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**December 16, 2011 - 12:13 PM**

## Transmittal Letter

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 Brief: Appellant's

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